

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACQUE K. BERKLEY FRYE

Claimant

VS.

ANGMAR MEDICAL HOLDINGS, INC.

Respondent

AND

ULLICO CASUALTY COMPANY

Insurance Carrier

Docket Nos. 1,059,923 &
1,059,925

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 16, 2012, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. John M. Ostrowski, of Topeka, Kansas, appeared for claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,059,925, the Administrative Law Judge (ALJ) found that claimant was entitled to medical care and that Dr. Gary Harbin remained designated as the authorized treating physician. There has been no appeal of that order. In Docket No. 1,059,923, the ALJ found that claimant failed to establish that the June 2, 2011, motor vehicle accident was the prevailing factor in causing her need for right knee replacement surgery.

The record on appeal is the same as that considered by the ALJ and consists of the evidentiary deposition of Jacque K. Berkley Frye taken July 27, 2012, and the evidentiary deposition of Dr. Gary L. Harbin taken June 15, 2012, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that she suffered a compensable accident and that the accident was the prevailing factor in causing her injury. Claimant contends the accident caused her severe pain in her right knee and left her dysfunctional in terms of the activities of daily

living. She asserts that although she had a preexisting degenerative condition of the right knee which was asymptomatic, in order to “cure and relieve” the effects of the work-related injury, claimant underwent a total knee replacement. Claimant also argues that K.S.A. 2011 Supp. 44-508(f)(2) does not state that otherwise compensable injuries should not receive medical treatment because they aggravate, accelerate or exacerbate a preexisting condition or render a preexisting condition symptomatic.

Respondent argues that claimant failed to sustain her burden of proof that the work-related accident was the prevailing factor in causing claimant’s knee injury. Respondent contends claimant’s preexisting degenerative condition of her right knee was the primary factor that necessitated her total knee replacement, not the contusion or bruise caused by the motor vehicle accident.

The issue for the Board’s review is: Was the injury claimant suffered as a result of her work-related motor vehicle accident the prevailing factor in her need for right total knee replacement?

FINDINGS OF FACT

Docket No. 1,059,925 involves a date of injury of December 9, 2011, that resulted in injuries to claimant’s bilateral upper extremities, neck, and body.¹ There is no appeal from the ALJ’s Order in this docketed claim.

Claimant was working for respondent as a physical therapist. She works out of the Salina office but would also travel outside of Salina. She was on the clock while she was driving. On June 2, 2011, she had left the office in Salina and was on her way to Great Bend, Kansas, when she was involved in a traffic accident. She immediately noted injuries to her right knee, right arm, and mid-back. Her right knee was injured when it hit the dashboard during the accident. The claim for this accident has been designated Docket No. 1,059,923.

Claimant testified her knee pain did not go away, so she went to see her family practitioner, Dr. Elaine Ferguson. An x-ray was taken of claimant’s knee, and claimant was told there were some bone fragments in the joint line. She was told to keep doing therapy on the knee and return in a couple weeks. When Dr. Ferguson saw claimant again, she was unable to walk without a limp. Dr. Ferguson referred her to Dr. Gary Harbin. Dr. Harbin performed knee replacement surgery on claimant on December 22, 2011, and released her to light duty work on February 22, 2012. Claimant testified she was released to perform full time work in regard to her right knee on or about July 18, 2012. She has no follow-up appointment or additional therapy or treatment scheduled. She said she had an excellent result from the knee replacement surgery.

¹ Form K-WC E-1, Application for Hearing filed March 8, 2012.

Claimant had previously injured her right knee on October 26, 2009. After treating it on her own about three weeks, she went to see Dr. Harbin. He confirmed that she had torn cartilage, and she was given a cortisone shot. She said the day before Thanksgiving 2009, Dr. Harbin performed arthroscopic surgery and removed the torn medial meniscus. Claimant said she went back to work the next Monday and had no pain or limitation after the surgery until the car accident.

Dr. Harbin, an orthopedic surgeon with an emphasis on knees and spine, testified that he evaluated and treated claimant's right knee in 2009. He said when he performed arthroscopic surgery on claimant's right knee in 2009, he noted she had some degenerative changes in her patella femoral joint and in the medial joint. He classified her degenerative changes as moderate. Her most significant degenerative change was in her kneecap. Dr. Harbin stated claimant's degenerative condition would continue to get worse over time. By December 2009, claimant was doing great overall and had no problems since the arthroscopic surgery.

Dr. Harbin next provided claimant with treatment beginning September 14, 2011, for problems she was having following a motor vehicle accident that had occurred in June 2011. Among other complaints, claimant was having right knee pain. She told Dr. Harbin she did not have any right knee symptoms prior to the accident. After the accident, her symptoms were intense enough that she was not functional on a daily basis with activities of daily living.

Dr. Harbin's impression on September 14, 2011, was patella femoral pain, medial degenerative joint, and a medial tibial contusion to the right knee and leg. Dr. Harbin said that although the July 2011 x-rays showed claimant had some loose ends in her right knee, the x-rays are not "consequential in estimating what has or has not happened in an accident, unless there is enough trauma to result in . . . a fracture."² Dr. Harbin said no treatment was recommended for claimant's right knee contusion. By the time Dr. Harbin next saw claimant on December 12, 2011, the bruise or contusion had resolved. Claimant was still complaining of right knee pain, and his diagnosis was advanced osteoarthritis, which Dr. Harbin said was the same condition she had in 2009, only more advanced.

Dr. Harbin said the motor vehicle accident in June 2011 accelerated claimant's right knee osteoarthritis. He believed the prevailing factor in causing claimant's right knee advanced osteoarthritis was her underlying degenerative condition.

Claimant was given the option of living with her symptoms or having a knee replacement, and claimant chose to have a knee replacement. Dr. Harbin said the knee replacement had nothing to do with the contusion on her right knee suffered in the accident. He said the timing of the knee replacement was accelerated by the trauma to

² Harbin Depo. at 25.

the knee, not the contusion. Without the preexisting osteoarthritis, the knee replacement would not have been required from the car accident. The car accident was an aggravation of the underlying degenerative disease. The right knee replacement surgery was necessary to repair the effects of the motor vehicle accident, *i.e.*, her inability to perform her activities of daily living. In January 2012, Dr. Harbin estimated that claimant would reach maximum medical improvement for the knee in April 2012 and she should be able to do full duty then. However, claimant testified she was not released to full duty until July 18, 2012.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

....
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

....
(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

....

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

ANALYSIS

The ALJ held that respondent was not responsible for the cost of claimant’s knee replacement surgery because the June 2, 2011, motor vehicle accident was not the prevailing factor that caused her need for the surgery. He concluded:

Claimant has sustained her burden of proof that the June 2, 2011 motor vehicle accident was the prevailing factor in causing a contusion to her right knee and leg. She has failed, however, to sustain her burden of proof that the motor vehicle accident was the prevailing factor in causing her underlying degenerative osteoarthritis and resulting disability or impairment. Claimant’s pre-existing

³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁴ K.S.A. 2011 Supp. 44-555c(k).

osteoarthritis was, based on the evidence before the court, the prevailing factor, in relation to any other factor, in causing her need for knee replacement surgery. The June 2, 2011 motor vehicle accident did accelerate the need for knee replacement surgery, but that was its only relationship to the surgery. The knee injury resulting from the June 2, 2011 motor vehicle accident is “not compensable solely because it aggravate[d], accelerate[d] or exacerbate[d] a preexisting condition or render[ed] a preexisting condition symptomatic.”⁵

Claimant argues that she suffered more than a mere bruise or contusion when her right knee struck the dashboard in her vehicle. Although the contusion may have healed, claimant was left with debilitating pain in her right knee which she did not have before the motor vehicle accident. The knee replacement surgery was “necessary to cure and relieve the employee from the effects of the injury.”⁶ Dr. Harbin acknowledges that claimant’s symptoms were the most important factor in his decision to do the surgery when he did. Nevertheless, what Dr. Harbin described as having taken place in claimant’s automobile accident was an aggravation of her degenerative arthritis process. He was unable to say what anatomical damage occurred.

There is no question that claimant’s knee replacement surgery would have been compensable under the law as it existed before May 15, 2011. However, in 2011 the Workers Compensation Act underwent significant amendments. It now includes K.S.A. 2011 Supp. 44-508(f)(2), which provides:

An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

In addition, K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii) provides:

(B) An injury by accident shall be deemed to arise out of employment only if:

...

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Something changed anatomically in claimant’s knee to cause her pain. This is evidenced by the fact that claimant’s pain continued even after her contusion had healed. Dr. Harbin agrees that there was such an anatomical change. However, he cannot say for sure what it was. Nevertheless, it was this anatomical change and the resulting pain that

⁵ ALJ Order (Aug. 16, 2012) at 3.

⁶ K.S.A. 2011 Supp. 44-510h(a).

led Dr. Harbin to recommend the treatment he provided, the knee replacement. Claimant argues that this satisfies the requirement in K.S.A. 2011 Supp. 44-508(d) that “[t]he accident must be the prevailing factor in causing the injury” because the “injury” that resulted in the surgery was the anatomical change that was causing claimant’s pain. As such, respondent is liable for the surgery to cure or relieve the injury. The question then becomes whether the “work was a triggering or precipitating factor” or if the injury “solely” aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic.⁷ Dr. Harbin is unable to say what changed anatomically to cause claimant’s pain. Nevertheless, he is able to say that the surgery was for treatment of advanced osteoarthritis and that osteoarthritis was a preexisting condition that was aggravated and accelerated by the motor vehicle accident. Whether the injury due to the accident “solely” aggravated, accelerated or exacerbated the preexisting condition is not entirely clear from this record. Claimant argues that this is a “certain defense” and thus respondent’s burden of proof. However, the statute makes this test and the prevailing factor test a part of the definition of what constitutes arising out of the employment. It is claimant’s burden to prove injury by accident arising out of employment. Given that it is claimant’s burden of proof, this Board Member concludes that claimant has failed in her burden.

Dr. Harbin’s diagnosis in December 2011 of advanced osteoarthritis was the same condition claimant had in 2009, just more advanced. This was a degenerative condition that Dr. Harbin said would progressively worsen regardless of any new trauma.

Q. [by respondent’s attorney] Can you say within a reasonable degree of medical certainty whether the accident in June of 2011 was the prevailing factor in relation to any other factor that caused that right knee advanced osteoarthritis?

A. [by Dr. Harbin] I would prefer to say it accelerated.

....

Q. Okay. In your medical expert opinion, again, would you—considering his objection, I understand it’s ongoing, but would you feel that the prevailing factor in causing the medical condition which you indicate is right knee advanced osteoarthritis, would be the underlying degenerative condition?

A. Yes.

....

Q. . . . Would the prevailing factor in relation to any other factor, the car accident or the underlying condition that led to the total knee replacement?

A. What led to the total knee replacement would be the degenerative situation, the timing when we did it would have most likely been accelerated by the trauma, not the contusion, but the trauma to the knee.

Q. So, the underlying condition was the degenerative osteoarthritis, but it was aggravated by the trauma?

A. Correct.

⁷ K.S.A. 2011 Supp. 44-508(f)(2).

Q. Okay. So, without the preexisting and underlying osteoarthritis, the knee replacement would not have been required from the car accident; is that a fair statement?

A. Yes.⁸

CONCLUSION

Based on the record presented to date, the undersigned Board Member finds that the injury to claimant's right knee, which resulted in her undergoing knee replacement surgery, was solely an aggravation of a preexisting condition and, therefore, is not a compensable injury. In addition, that injury did not arise out of claimant's employment with respondent because the work-related accident was not the prevailing factor causing the injury and medical condition.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 16, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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⁸ Harbin Depo. at 11-13.